The exception in favor of a purchase-money mortgage given to the settlor at the time of the conveyance is not in conflict with these principles. It may be justified either on the ground that the donor of the power has expressly authorized the mortgage by accepting it, or by the rule that the conveyance and mortgage should be construed as one instrument, and that therefore only an equity of redemption was in fact conveyed.[8] Accordingly, a recent Maryland case held that when land was settled in trust for A for life, remainder over, with a power in A to convey the fee and to invest the proceeds on similar trusts, a purchase-money mortgage made by A to the settlor was good, although a second mortgage given by A to the assignees of the first mortgage was invalid. *Stump* v. *Warfield*, 65 Atl. Rep. 346. It seems settled that a power of sale does not include the right to exchange,[9] partition,[10] contract to sell on credit,[11] or transfer gratuitously;[12] and following these analogies a power of sale should be construed strictly so as to make a mortgage valid only when exceptional circumstances indicate an implied authority.

RECENT CASES.

ANIMALS — TRESPASS ON REALTY BY ANIMALS — STRAYING FROM HIGHWAY. — The defendant's cattle, while being driven along a public highway, escaped without negligence on the part of the driver and went upon the adjoining unfenced lands of B, over which they passed to the unfenced lands of the plaintiff. *Held*, that the plaintiff may recover for the trespass. *Wood* v. *Snider*, 187 N. Y. 28.

At common law the owner of cattle was bound to keep them from straying on another's land, whether that land was fenced or not. *Tonawanda R. R. Co.* v. *Munger*, 5 Den. (N. Y.) 255. This strict rule has been modified in the case of land adjoining a highway, when the driver of the cattle is not negligent. *Tillett* v. *Ward*, 10 Q. B. D. 17; *Hartford* v. *Brady*, 114 Mass. 466. A possible explanation of the exception is that, since the owner of the cattle is unable to fence against straying, the law casts the burden upon the adjoining owner. The purpose of a fence is to restrain cattle from straying rather than to prevent trespassing by those of the adjoining owner. See *Hurd* v. *Rutland & B. R. R. Co.*, 25 Vt. 116. The highway exception, however, only applies when the cattle are rightfully on the highway. *Mills* v. *Stark*, 4 N. H. 512. It would therefore follow that the exception should not be extended to a remote owner, for, as the cattle are not rightfully on the adjoining owner's land but there only with a justification, their further trespass on the lands of the remote owner is not excused by the want of a fence. See *Lord* v. *Wormwood*, 29 Me. 282.

BANKRUPTCY — DISCHARGE — PARTNER'S LIABILITY BARRED BY INDIVIDUAL DISCHARGE. — The defendant had been discharged in voluntary individual bankruptcy proceedings, his schedule including a debt to the plaintiff, who was properly notified. No mention was made in the petition, schedule, or discharge, of firm liabilities. *Held*, that, conceding the debt to the plaintiff to be a firm obligation, the defendant's liability on it was discharged by the individual discharge, whether there were any firm assets or not. *New York Institu-*

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[8] Coutant *v.* Servoss, 3 Barb. (N. Y.) 128. *Cf.* Boies *v.* Benham, 127 N. Y. 620.
[9] See Woodward *v.* Jewell, 140 U. S. 247, 253.
[10] *Cf.* Paget *v.* Melcher, 42 N. Y. App. Div. 76.
[11] See Repetto *v.* Baylor, 61 N. J. Eq. 501, 506.
[12] Stocker *v.* Foster, 178 Mass. 591.

tion for Deaf and Dumb v. *Crockett*, 36 N. Y. L. J. 1535 (N. Y., App. Div., Jan., 1907).

The Bankruptcy Act provides for the bankrupt's discharge from all provable debts with certain express exceptions. Since it is recognized that firm debts are provable against a bankrupt partner's estate, the conclusion that the above provision covers such obligations seems sound. Such is the weight of authority under both the Act of 1867 and that of 1898. *Wilkins* v. *Davis*, Fed. Cas. 17664; *In re Diamond*, 149 Fed. Rep. 407; but see *In re Freund*, 1 Am. B. Rep. 25. § 5 *h* of the Act of 1898, providing for the management of the firm estate by the solvent partners, and § 16, providing that their liability on firm obligations shall not be affected by the individual bankrupt's discharge, clearly contemplate such a result. Many decisions, however, differ from the present in holding that there can be no discharge of firm debts unless they are specifically mentioned as such in the petition and discharge. *In re Morrison*, 127 Fed. Rep. 186; but *cf. Jarecki Mfg. Co.* v. *McElwaine*, 107 Fed. Rep. 249. The contention is also made that only where there are no firm assets will firm liabilities be discharged. See *Curtis* v. *Woodward*, 58 Wis. 499, 506. These distinctions, however, seem unsound, since they impose limitations for which the Act itself makes no provision.

BANKRUPTCY — JURISDICTION OF STATE COURTS — DETERMINATION OF TITLE TO PROPERTY IN POSSESSION OF TRUSTEE. — A vendor of chattels rescinded the sale because of fraud, brought action in a state court to recover them, and attached the property on mesne process. The trustee appointed in subsequent bankruptcy proceedings against the buyer took possession of this property, and was made a party to the action in the state court. Judgment was there rendered for the vendor. His application to the court of bankruptcy for delivery of the goods was contested on the ground that the state court was without jurisdiction. *Held*, that the adjudication by the state court is conclusive. *Linstroth Wagon Co.* v. *Ballew*, 149 Fed. Rep. 966 (C. C. A., Fifth Circ.).

With certain express exceptions, it is the purpose of the Bankruptcy Act to leave the adjudication of all questions, except those which fall within the somewhat indefinite category of "proceedings in bankruptcy," to those courts in which actions by or against the bankrupt, were he a solvent person, could have been brought. *Bardes* v. *Bank*, 178 U. S. 524; see *In re Abraham*, 93 Fed. Rep. 767. This would seem to leave with the state courts jurisdiction of claims for goods, whether in possession of the trustee or of the bankrupt. But the Supreme Court has taken the view that property in possession of the trustee is in the custody of the bankruptcy court and that process of a state court is not effectual to recover it. *White* v. *Schloerb*, 178 U. S. 542. It follows that a claimant of such property can maintain in the state court trespass or trover, but not replevin, against the trustee. *In re Russell*, 41 C. C. A. 323; see *Crosby* v. *Spear*, 98 Me. 542; *contra*, *Cooke* v. *Scovel*, 68 N. J. L. 484. In this case, however, as the state court, by attaching the goods before the bankruptcy proceedings, obtained custody prior to the bankruptcy court, its jurisdiction over the action is unquestionable.

BANKRUPTCY — PARTIES IN INTEREST. — Two debtors of the bankrupt filed objections to the allowance of certain claims, alleging that their position would be prejudiced by the allowance. *Held*, that the petitioners, not having an interest in the *res*, are not parties in interest and have no standing in court. *In re Sully*, 36 N. Y. L. J. 1971 (C. C. A., Second Circ., Feb., 1907).

Under § 57 *d* of the Bankruptcy Act claims are allowed unless, among other things, objections are made by "parties in interest." This phrase is also used to designate who may apply to set aside a composition, to object to a discharge, or to revoke a discharge. A creditor who has been scheduled as such, though he has not proved his claim, is within the meaning of the term in order to oppose a discharge. *In re Frice*, 96 Fed. Rep. 611. And he has been given this right even when proof of his claim has been barred by the expiration of the time allowed by the Act. *In re Bimberg*, 121 Fed. Rep. 942. But the present case seems correct in restricting petitions to oppose the allowance of claims to those

who have a direct interest in the administration of the bankrupt's estate. Such restriction must have been intended by Congress, since to allow interference by any one incidentally affected, as in this case, would lead to almost unlimited complication and delay in the adjustment of all bankruptcy proceedings.

BANKRUPTCY — RIGHTS AND DUTIES OF BANKRUPT — PERJURY IN EXAMINATION. — The defendant swore falsely in an examination before a referee in bankruptcy. He was indicted under § 29 *b* (2) of the Bankruptcy Act, which makes it an offense punishable by imprisonment to make a false oath "in relation to any proceeding in bankruptcy." The defendant pleaded the provision of § 7 *a* (9), that "no testimony given by him [the bankrupt] shall be offered in evidence against him in any criminal proceeding." *Held*, that the testimony in which the perjury occurred is admissible. *Edelstein* v. *United States*, 149 Fed. Rep. 636 (C. C. A., Eighth Circ.).

It is a rule of statutory construction that general terms may be limited to accord with the plain intent of the legislature or to harmonize with other parts of the statute. *Kennedy* v. *Gies*, 25 Mich. 83. Perjury by a bankrupt in his examination is held by the weight of authority to be a punishable offense within § 29 for the purpose of barring a discharge, although dicta intimate that there could be no conviction or punishment of the offense because of the inadmissibility of the testimony. *In re Gaylord*, 112 Fed. Rep. 668; *contra*, *In re Mark*, 102 Fed. Rep. 676. The literal construction of the immunity clause would interpret the Act as preventing by one section the punishment of an offense created by another section. Since that construction fails to harmonize these provisions of the Act and violates the plain intent of the legislature not to place a premium on perjury, the construction of the present court seems sound in limiting the immunity clause to offenses disclosed by the testimony. *Contra*, *United States* v. *Simon*, 146 Fed. Rep. 89.

BILLS AND NOTES — PAYMENT AND DISCHARGE — REMEDIES ON LOST INSTRUMENT. — The defendant, a holder for value of a promissory note indorsed by the plaintiff, the payee, lost it. At maturity, without tendering a bond of indemnity, he demanded payment of the maker, who refused to pay. Thereupon the plaintiff, with knowledge of the facts, paid the defendant. The maker became insolvent, and the plaintiff sued for damages. *Held*, that he cannot recover. *Rogers* v. *Detroit Savings Bank*, 110 N. W. Rep. 74 (Mich.). See NOTES, p. 566.

CARRIERS — STREET RAILWAYS — CONTINUOUS TRANSPORTATION IN ONE CAR. — The plaintiff boarded the defendant's street-car at a time when the motorman knew that, because of a disarranged schedule, his car would not complete the trip indicated by its sign; but no notice of this was given the plaintiff. The plaintiff refused to transfer to a car ahead, and sued the defendant for failing to carry him to his destination in the original car. *Held*, that he can recover. *Burrow* v. *Norfolk Ry. & Light Co.*, 12 Va. L. Reg. 763 (Va., Corp. Ct. Norfolk, Feb., 1907).

This case raises one of the numerous problems in the law of carriers where, in order to determine what regulation is reasonable, the convenience of the company and of the entire public must be considered as well as the convenience of the plaintiff. *Cf. Faber* v. *Railway Co.*, 62 Minn. 433. In the only other case found bearing on this particular point the company was held not liable. *O'Connor* v. *Halifax Tramway Co.*, 37 Can. Sup. Ct. 523. But there some notice had been given that the car would not complete the trip indicated by its sign, and the circumstances were otherwise exceptional. The argument advanced in the present decision, that notice of the intended change must be given to passengers boarding the car, seems rather unreasonable. Of course, passengers compelled to change have a remedy for any failure to provide proper seating facilities in the cars to which they are transferred. *Louisville, etc., R. R. Co.* v. *Patterson*, 69 Miss. 421; see *Camden, etc., R. R. Co.* v. *Hoosey*, 99 Pa. St. 492, 497. A statute or city ordinance may impose a penalty for putting passengers to the inconvenience of changing unless it is unavoidable. Such an

ordinance has been held reasonable. *City of New York* v. *Interurban St. Ry. Co.*, 43 N. Y. Misc. 29.

CONFLICT OF LAWS — EFFECT AND PERFORMANCE OF CONTRACTS — CONTRACT TO PERFORM TO SATISFACTION OF OTHER PARTY IN ANOTHER STATE. — The plaintiff, by his New York agent, made a written contract in Illinois to install machinery in Iowa. The contract provided that payment should not be required until the machinery was "to the full satisfaction" of the defendant in certain regards. By the law of New York and of Illinois the promisee's dissatisfaction in such case must be reasonable; by that of Iowa it need only be honest. The plaintiff sued for the price in Iowa. *Held*, that evidence is inadmissible to show the New York-Illinois meaning. *Inman Mfg. Co.* v. *American Cereal Co.*, 110 N. W. Rep. 287 (Ia.). See NOTES, p. 558.

CONFLICT OF LAWS — LEGITIMACY AND ADOPTION — LEGITIMATION SUBSEQUENT TO BIRTH. — A New York man deserted his wife and purported to marry a New Jersey woman, who bore him two children. Thereafter he became domiciled with his family in Michigan, obtained a divorce there from his New York wife without personal service and by default, and went through a second marriage ceremony with the New Jersey woman. This divorce and remarriage a New York court by decree refused to recognize. By Michigan law illegitimate children become legitimate by the subsequent marriage of their parents. The children claimed New York realty under a devise as the "lawful issue" of their father. *Held*, that they take. *Olmsted* v. *Olmsted*, 36 N. Y. L. J. 2073 (N. Y., App. Div., March, 1907).

This reverses the decision of the lower court, criticized in 20 HARV. L. REV. 400.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — ADMINISTRATION OF ESTATE OF LIVING PERSON. — A wife, whose husband had not been heard from for eight years, petitioned to have his will admitted to probate under a statute which declared that a person should be presumed dead at the termination of seven years from the time when such person was last heard from. *Held*, that the will be admitted to probate. *In re Sternkopf*, 65 Atl. Rep. 177 (N. J., Prerogative Ct.).

See, for a discussion of the principles involved, 19 HARV. L. REV. 535.

CORPORATIONS — DIRECTORS — LIABILITY OF CORPORATION FOR EXPENSE OF NOTICES OF MEETING OF SHAREHOLDERS. — The directors of a corporation, for the purpose of calling a meeting of the shareholders to consider a dispute existing between the directors and the president, published through the plaintiff four advertisements in newspapers. The first was simply a notice of the meeting; the second urged the shareholders to execute and return in favor of the directors proxies previously sent out; the third and fourth stated the history and merits of the dispute. The plaintiff sued the corporation for its services. *Held*, that there can be recovery only for publishing the first notice. *Lawyers' Advertising Co.* v. *Consolidated Ry., etc., Co.*, 36 N. Y. L. J. 2023 (N. Y., Ct. App., Dec. 19, 1907).

For a discussion of the principles involved, see 20 HARV. L. REV. 328.

CORPORATIONS — FOREIGN CORPORATIONS — IMPLIED CONSENT TO SERVICE UPON STATE OFFICIAL. — An insurance company issued a policy in Indiana, running to a citizen of Pennsylvania as beneficiary, on which a judgment was obtained in Pennsylvania by service on the company through the state insurance commissioner, under a statute providing that no foreign insurance company should do business within the state until it had filed with the commissioner an agreement to accept service through him. The company had never filed such a stipulation, but it had transacted business in Pennsylvania. *Held*, that the judgment is void, as consent to service will not be implied here. *Old Wayne Mutual Life Ass'n* v. *McDonough*, 204 U. S. 8.

Statutes of many states now provide that foreign corporations doing business within the state must appoint some state official or other person to accept ser-

vice for them. It is the doctrine of the federal courts that a corporation actually doing business within a state, without complying with such provision, may nevertheless be validly served in accordance with the requisition of the statute. *Conn. Mutual Life Ins. Co.* v. *Spratley*, 172 U. S. 602; but *cf. Rothrock* v. *Dwelling House Ins. Co.*, 161 Mass. 423. But courts are strongly inclined to construe such statutes as limited to litigation concerning business done within the state. *Bawknight* v. *Ins. Co.*, 55 Ga. 194. However, the United States Supreme Court, in a case where a corporation had done business within the state, took jurisdiction, although the cause of action arose outside the state, and intimated that a state might by statute provide for such jurisdiction. *Barrow Steamship Co.* v. *Kane*, 170 U. S. 100. Although, if the present decision involves merely a construction of the statute, it raises no new question, yet the reasoning of the court suggests that even if the statute expressly included causes of action arising outside the state, the doctrine of implied consent to service would not be applied.

CORPORATIONS — STOCKHOLDERS' INDIVIDUAL LIABILITY TO CREDITORS — LIABILITY FOR STOCK ISSUED FOR OVERVALUED PROPERTY. — The defendants, owning a brick plant worth $36,000, sold it to a corporation for $75,000 in paid-up stock, honestly believing it worth that much. The corporation became insolvent, and its trustee brought suit on behalf of creditors for additional payment on the stock so issued. *Held*, that the defendants need not pay. *Hemenway* v. *Honolulu Clay Co.*, [1907] Haw. 187.

For a discussion adverse to this holding, see 19 HARV. L. REV. 366.

CORPORATIONS — ULTRA VIRES — EFFECT OF BEQUEST AND DEVISE TO CORPORATION IN EXCESS OF CHARTER LIMITATIONS. —The defendant corporation, the residuary devisee and legatee of S, was authorized by law to hold realty and personalty to an amount not exceeding $1,500,000. The residuary devise and bequest amounted to $3,000,000. After the death of S, the legislature passed an act increasing the amount of realty and personalty which the defendant might hold to $5,000,000. The heirs and next of kin of S claimed the property so devised and bequeathed by him. *Held*, that the defendant is entitled to hold against all the world, the state having waived any rights it might have had. *Hubbard* v. *Worcester Art Museum*, 80 N. E. Rep. 490 (Mass.). See NOTES, p. 561.

CRIMINAL LAW — APPEAL — CONVICTION ON MERITS UNDER DEFECTIVE INDICTMENT. — The defendant was indicted for adultery in the Philippine Islands, where he was entitled to be informed of the nature of the crime charged and to due process of law as provided in the Constitution of the United States. Every element of the crime was proved at the trial, but the indictment omitted one essential averment. Having failed to object to the defect before judgment, the defendant raised the point on appeal, but the judgment was affirmed. *Held*, that the defendants' rights have not been infringed. One justice dissented. *Serra* v. *Mortiga*, U. S. Sup. Ct., Feb. 25, 1907.

The court relies on a former decision where it was held, on the ground of double jeopardy, that an acquittal on the merits was a bar to a second trial, even though the indictment was fatally defective. *United States* v. *Ball*, 163 U. S. 662. That doctrine seems sound, although contrary to generally established law. See 10 HARV. L. REV. 243. But there the defect was overlooked in order to protect the constitutional right of exemption from double jeopardy; a similar disregard for irregularity in the present case tends to deprive the defendant of constitutional rights. However, since the entire crime was proved, the defendant has had substantial justice, and it would seem that he was properly held to have waived his right to object. But if the crime involved punishment by death, the interest of the state in the life of a citizen would prevent a waiver from being effective even though it had been express. *Hopt* v. *Utah*, 110 U. S. 574. A few cases have been found in accord with the present. *Eaves* v. *State*, 113 Ga. 749; see *People* v. *Moran*, 43 N. Y. App. Div. 155; aff. 161 N. Y. 657. But the general view has been to the contrary. *Com.* v. *Doyle*, 110 Mass. 103.

DEEDS — EXCEPTIONS AND RESERVATIONS — EXCEPTION OF LAND IN WHICH EASEMENT PREVIOUSLY GRANTED. — M granted a strip of land to a railway, by a deed which the court construed to give only an easement. Later M conveyed the tract to the plaintiff's grantor, "excepting a strip of land . . . heretofore deeded to the railway . . . now occupied by the . . . road." A successor of the railway ceased, for eleven years, to use the land. The plaintiff claimed the fee. *Held*, that the fee was excepted, so that the plaintiff has no title. *Spencer* v. *Wabash Railway Co.*, 109 N. W. Rep. 453 (Ia.).

The court's construction that M, by the language used, excepted a fee from her grant is supported by authority. *Munn* v. *Worrall*, 53 N. Y. 44; *Reynolds* v. *Gaertner*, 117 Mich. 532. However, there is much weight in the view of the dissenting judges that there was a conveyance of the entire interest and that the exception, in effect, operated only as a limitation upon the covenants of warranty. *Gould* v. *Howe*, 131 Ill. 490. It seems improbable that M intended to retain so small an interest in the land; and, where reasonable, the minority's construction would generally be highly desirable, since a separate ownership of such strips decreases their usefulness and is productive of litigation. Granting that a fee was excepted, the case seems opposed to an earlier Iowa decision, which it did not purport to overrule, holding that when an easement is abandoned by a railway, the land belongs to the present owners of the tract of which it had been a part, although it had never been conveyed to them. *Smith* v. *Howe*, 103 Ia. 95; see IOWA CODE 1897, § 2015.

ELECTIONS — WHETHER VOTING BY BALLOT MEANS BY SECRET BALLOT. — The state constitution provided for voting by ballot. A statute required all ballots to be numbered for purposes of identification in case of a contested election. *Held*, that the statute is constitutional. *Ex parte Owens*, 42 So. Rep. 676 (Ala.).

It is undoubtedly true that the element of secrecy in voting by ballot is the feature of the system which caused its widespread adoption. As a matter of definition, however, it can hardly be said that a ballot has ever been considered to lose its character entirely, merely because the identity of the voter could be subsequently disclosed. See 1 BOUV. L. DICT. 216. The word as used in a constitution, therefore, does not necessarily imply absolute secrecy, and without such implication the statute in question is valid. See *People* v. *Fisher*, 24 Wend. (N. Y.) 215. The fact that the effect of a statute seems contrary to the intent of the framers of the constitution or to public policy should not of itself make the act unconstitutional. *State* v. *McLelland*, 138 Ind. 395. It is believed that the failure to recognize this last principle accounts for the view contrary to that of the present case, which is taken in the only other cases found which raise this exact point. *Williams* v. *Stein*, 38 Ind. 89; *Brisbin* v. *Cleary*, 26 Minn. 107.

EMINENT DOMAIN — COMPENSATION — CLAIM IN RESPECT OF POSSESSORY TITLE. — Land occupied by a trespasser as his own for ten years was taken by the crown under a resumption statute. No valuation was made nor compensation given. When the period of limitation after the trespasser's entry had elapsed and the true owner had not appeared, the executors of the trespasser demanded that the proper officer value the land. He refused on the ground that the executors could have no claim for compensation. *Held*, that *mandamus* issue to compel the valuation. *Perry* v. *Clissold*, [1907] A. C. 73. See NOTES, p. 563.

EMINENT DOMAIN — RIGHT TO ABANDON PROCEEDINGS. — A railway company instituted proceedings to condemn land, and after the damages had been assessed and the judgment entered attempted to abandon the project. *Held*, that the company cannot withdraw. *Union Ry. Co.* v. *Standard Wheel Co.*, 149 Fed. Rep. 698 (C. C. A., Sixth Circ.).

It is held by the weight of authority, contrary to the present case, that after the entry of judgment the condemnor ordinarily may withdraw. *City of Chicago* v. *Barbian*, 80 Ill. 482. The reason is that the condemnor should be allowed to ascertain the expense of the project before finally deciding to proceed. *O'Neil* v.

Freeholders of Hudson, 41 N. J. L. 161. On the other hand, it has been held that after the land-owner has been put to the inconvenience of condemnation proceedings, he should be entitled to enforce the judgment. *Drath* v. *Burlington, etc., R. R. Co.*, 15 Neb. 367. This argument is not of great weight, since the court may require the condemnor in case of abandonment to make good any loss occasioned by the proceedings. *In Matter, etc., Waverly Water Works Co.*, 85 N. Y. 478. In some instances, however, the condemnor must proceed after a confirmation of the damages assessed has been made by the court at his request. *Matter of Rhinebeck, etc., R. R. Co.*, 67 N. Y. 242. But after mere assessment of damages the right to abandon should be allowed, though it must be exercised within a reasonable time in order to protect the land-owner. *State of Ohio* v. *C. & I. R. R. Co.*, 17 Oh. St. 103. Some cases which refuse the right to withdraw depend on the wording of the statute. *Stafford* v. *Mayor, etc., of Albany*, 7 Johns. (N. Y.) 541.

EQUITY — SPECIFIC PERFORMANCE — LACK OF MUTUALITY OF REMEDY AS DEFENSE. — The assignee of an insolvent corporation sold its real estate, agreeing to procure the resignation of the old officers and directors. Having done so, he filed a vendor's bill for specific performance. *Held*, that the vendee's original lack of mutuality of remedy is no defense. *Kentucky Distilleries, etc., Co.* v. *Blanton*, 149 Fed. Rep. 31 (C. C. A., Sixth Circ.).

For a discussion of the principles involved, see 20 HARV. L. REV. 57.

EVIDENCE — FOREIGN LAW — PROOF TO BE MADE TO COURT. — An action was brought for a tort committed in another state. Proof of apparently unconflicting foreign statutes and decisions was made to the court out of the presence of the jury. *Held*, that this method is proper. *Christiansen* v. *Graver Tank Works*, 223 Ill. 142.

Although the foreign law must be proved as a fact, jurors are, as a rule, incompetent to deal with such abstruse questions, and this has led to the majority rule in this country which leaves all such proof to the court. *Ferguson* v. *Clifford*, 37 N. H. 86. Even where there is conflicting oral evidence, so that the credibility of witnesses is involved, the rule is the same. *Hooper* v. *Moore*, 5 Jones L. (N. C.) 130. The contrary view on this last point seems clearly preferable as preserving to the jury one of its ordinary functions. *Holman* v. *King*, 7 Met. (Mass.) 384. So, where there is conflicting written evidence, it would seem desirable for the jury to pass upon it. But the present case is undoubtedly correct, though the court evidently intended to adopt the wider rule. For, since the evidence was harmonious, the court construed the written evidence as it would other documents. *Cook* v. *Bartlett*, 179 Mass. 576. In England an intermediate rule seems to prevail, which requires the court to assist the jury, though the question is ultimately left to the latter. See *Mostyn* v. *Fabrigas*, 1 Cowp. 161, 174.

FEDERAL COURTS — JURISDICTION — UNITED STATES AS PARTY. — A federal statute required every contractor for public works to execute a bond to the United States conditioned upon performance of the contract and upon payment of persons supplying materials, and further provided that any one supplying materials might sue on this bond to his own use in the name of the United States. A materialman brought an action in a federal court under this statute. *Held*, that the United States is a real and not merely a nominal party, and that, therefore, the federal courts have jurisdiction. *U. S. Fidelity & Guaranty Co.* v. *United States*, U. S. Sup. Ct., Feb. 25, 1907.

This decision affirms that of the lower court, which was criticized in 18 HARV. L. REV. 314.

FIXTURES — EFFECT OF AGREEMENTS ON THEIR CHARACTER. — A, in possession of the defendant's mill under a contract of purchase, had agreed that all machinery placed upon the premises should become a part of the realty. He annexed an engine bought from the plaintiff under an agreement that title should remain in the vendor until full payment. After default on both contracts A surrendered to the defendant the mill with the engine still annexed.

Held, that, on refusal to deliver, the plaintiff may sue for conversion of the engine. *Davis* v. *Bliss*, 187 N. Y. 77. See NOTES, p. 565.

HUSBAND AND WIFE — CREATION OF MARRIAGE RELATION — COMMON LAW MARRIAGE AS AFFECTING BIGAMY. — On an indictment for bigamy the state relied upon proof of a former marriage, accomplished merely by promises *in praesenti* followed by cohabitation by the parties as man and wife. *Held*, that there has been no former marriage to support a conviction. *Bates* v. *State*, 29 Oh. Circ. Ct. Rep. 189.

An indictment for bigamy cannot, of course, be supported without proof of a former valid marriage. But the view has been generally adopted in this country that promises *in praesenti* followed by cohabitation accomplish a valid marriage, even under marriage statutes which are mandatory in form, unless they contain express words to the contrary. *Meister* v. *Moore*, 96 U. S. 76; *Heymann* v. *Heymann*, 218 Ill. 636; *contra*, *Dunbarton* v. *Franklin*, 19 N. H. 257. The court in the present decision recognizes as authoritative a case in which a conviction for bigamy was supported, although the person who solemnized the marriage had not the required authority. *Carmichael* v. *State*, 12 Oh. St. 553. It is true that the English rule, explained by the necessity there of some religious solemnity, conflicts with that decision. *Catherwood* v. *Caslon*, 13 M. & W. 261. But it seems difficult to find any satisfactory reason for refusing to apply the principle recognized in the earlier Ohio decision — namely, that compliance with statutory requirements is not essential to a binding marriage — to the facts in the present case. General policy favors supporting common law marriages, and there seems to be no good reason for rejecting them in criminal prosecutions and supporting them in civil actions.

ILLEGAL CONTRACTS — CONTRACTS AGAINST PUBLIC POLICY — ATTORNEYS' FEES FOR SOLICITED BUSINESS. — The plaintiffs, a firm of attorneys, solicited a large number of claims for personal injuries and brought suit thereon. The defendants compromised with the claimants without the consent of the attorneys, and the latter sued the defendants for the fees promised by the claimants. *Held*, that the contracts obtained by the solicitation of the attorneys are invalid. *Ingersoll* v. *Coal Creek Coal Co.*, 98 S. W. Rep. 178 (Tenn.).

This case seems the first of its kind. Others resembling it have included the additional element of maintenance. See *Gammons* v. *Johnson*, 76 Minn. 76. But this contract was objectionable neither on that ground nor because of the promise of a contingent fee. The decision must be based solely upon public policy, which forbids such professional impropriety and so close an approach to barratry. To solicit causes of action tends to promote litigation and to degrade the profession. That such practice is regarded as undesirable is shown by the decisions which declare void attorneys' contracts to pay for business brought to them. See *Alpers* v. *Hunt*, 86 Cal. 78. And New York makes the formation of such a contract a misdemeanor. N. Y. CIVIL CODE, § 74. Although the court could rely upon neither statute nor precedent, it exercised a well-recognized and proper discretion in thus asserting public policy. See *Jones* v. *Randall*, 1 Cowp. 37, 39. In the absence of a statute the facts of this case would not justify disbarment, since they do not show that the attorneys lacked the mental or moral qualities necessary in members of the profession. Discreditable behavior in itself is not sufficient. *Dickens' Case*, 67 Pa. St. 169.

INTERSTATE COMMERCE — CONTROL BY CONGRESS — STATE JURISDICTION TO HOLD UNREASONABLE CHARGES POSTED AND FILED UNDER ACT OF 1887. — A shipper sued a railway in a state court to recover an alleged overcharge on an interstate shipment. The rate exacted by the carrier was that fixed by the schedules which it had posted and filed with the Interstate Commerce Commission in compliance with the Act to Regulate Commerce of 1887. § 22 of the Act expressly saved common law remedies, and § 9 expressly conferred on federal courts jurisdiction of offenses within the Act, of which overcharging was one. *Held*, that the action cannot be maintained. *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, U. S. Sup. Ct., Feb. 25, 1907.

The court recognizes that the common law gives a shipper a right to recover overcharges by a carrier on an interstate shipment. *W. U. Tel. Co.* v. *Call Pub. Co.*, 181 U. S. 92. The decision rests wholly on the basis that the Act of 1887 impliedly deprived state and federal courts of the power to declare duly scheduled rates unreasonable, unless the Interstate Commerce Commission has previously found them so. Both the apparently contrary provisions of the Act the court overrides by an implication based on its general scope and purpose. The underlying ground is the confusion that would spring from a contrary result in view of the provisions of the Act as to discrimination. For § 6 forbids a carrier to charge more or less than the scheduled rate. This rate is thus made a standard, and even contracts to depart from it are unenforceable. *Texas & Pacific Ry. Co.* v. *Mugg*, 202 U. S. 242. It is plain, then, that the very compliance by a carrier with a state judgment would be a violation of the Act. Furthermore, the Commission was created to deal with the determination of rates, and it would be against the policy of the Act to take questions of reasonableness wholly from that board, and leave them to juries incapable of adequately meeting them. *Kinnavey* v. *Terminal Ry. Ass'n*, 81 Fed. Rep. 802.

INTERSTATE COMMERCE — CONTROL BY STATES — TRAVELLING SALESMEN SOLICITING ORDERS FOR LIQUOR. — A state statute imposed a license charge upon travelling salesmen soliciting orders for intoxicating liquor. The defendant, representing a firm in another state, solicited from residents proposals to buy liquor for their own use. If his firm accepted them, it shipped the liquor from its own state to the buyers. The defendant was prosecuted for not having paid the license charge. *Held*, that the statute, being a police regulation, is not invalid as a restriction on interstate commerce, and that conviction of the defendant under it is proper. *Delamater* v. *State*, U. S. Sup. Ct., March 11, 1907.

The state's police power is allowed by the Wilson Act to extend over imported liquor, though still in the original package. 26 U. S. STAT. AT L. 313, c. 728. Aside from the question of interstate commerce, the police power is competent to regulate not only the sale of liquor but also the keeping of it for the owner's consumption. *Mugler* v. *Kansas*, 123 U. S. 623. Therefore, solicitation to purchase liquor, for selling or keeping, is naturally within the police power also. The opinion, however, raises a difficulty by stating that the police power does not, even under the Wilson Act, extend over liquor received from another state for the receiver's own consumption. See *Pabst Brewing Co.* v. *Crenshaw*, 198 U. S. 17, 25. If this be sound, the defendant's soliciting seems, contrary to the decision, which is based on the alleged analogy of life insurance cases, unobjectionable. However, the true rule would seem to be that, though by the Wilson Act shipments are not subject to police regulation until delivery, nevertheless the solicitation of shipments is subject to it entirely. For since the ultimate act, whether of selling or keeping, should be subject to the police power, the fact that the solicitation of the preliminary step of transportation is lawful may be practically disregarded.

LANDLORD AND TENANT — COVENANTS IN LEASES — WHETHER COVENANT INDIRECTLY AFFECTING VALUE RUNS WITH LAND. — A lease from A to B contained a proviso for reëntry in case of breach of B's covenant to repair. In making a sublease of part of the premises to C, B covenanted that he would repair the part of the premises retained. The defendant, B's assignee, failed to repair; whereupon A reëntered and ejected the plaintiff, C's assignee. *Held*, that B's covenant to C did not run with the land sublet so as to give C's assignee a right of action. *Dewar* v. *Goodman*, 23 T. L. R. 225 (Eng., K. B. D., Jan. 11, 1907).

It is agreed that performance on the premises is not essential to covenants running with the land, but difficulty is met in determining what covenants to be performed elsewhere will run. The more extreme view of some American cases is that a covenant indirectly affecting the value of land to the holder will run, as in the case of an agreement not to establish a competing business on neighboring land. *Norman* v. *Wells*, 17 Wend. (N. Y.) 136; *Nat'l Union*

Bank v. *Segur*, 39 N. J. L. 173. In these jurisdictions the present defendant would probably have been liable. By the more conservative view, however, such a covenant by a lessor will not run with the leased premises. *Thomas* v. *Hayward*, 4 Exch. 311. In general, a covenant running with the land must have a direct effect, independent of collateral circumstances, upon the nature, quality, or value of the thing demised, or upon the mode of enjoying it. *Mayor of Congleton* v. *Pattison*, 10 East 130; *Gibson* v. *Holden*, 115 Ill. 199. The covenant in the present case does not meet these requirements; the effect of a breach upon the land demised is dependent upon a collateral circumstance, namely, the election of the superior landlord to avail himself of the proviso for reëntry contained in the original lease.

LIBEL AND SLANDER — ACTS AND WORDS ACTIONABLE — WORDS IMPUTING UNCHASTITY TO WOMAN. — The defendant used words imputing unchastity to the plaintiff, an unmarried woman. The plaintiff sued for slander without alleging or proving special damage. *Held*, that, although the acts charged were not criminal, the action is maintainable. *Battles* v. *Tyson*, 110 N. W. Rep. 299 (Neb.).

The long-established rule of the common law refusing relief to a woman who has been charged with unchastity unless she can show special damage, has often been severely criticized. See *Lynch* v. *Knight*, 9 H. L. Cas. 577, 593. It is simply an arbitrary rule, unexplained even by the side-lights of history and indefensible on principle, for such a charge is infinitely more damaging to a woman than that of some comparatively slight offense for which the law provides punishment. The court in the present case is therefore justified in departing from established law, though few other courts have had the temerity to do so. *Cushing* v. *Hederman*, 117 Ia. 637; *Barnett* v. *Ward*, 36 Oh. St. 107; see *Smith* v. *Minor*, 1 N. J. L. 19. One of these jurisdictions has refused to give redress where a man is the subject of the charge. *Davis* v. *Brown*, 27 Oh. St. 326. That the common law rule is not satisfactory is shown by the fact that some states have changed the rule by statute. *Campbell* v. *Irving*, 146 Ind. 681, 683. In others the same result comes about from statutes making specific acts of unchastity criminal, so that the words necessarily charge with a crime. *Hacker* v. *Heiney*, 111 Wis. 318.

MORTGAGES — RIGHTS AND LIABILITIES OF PARTIES — APPLICATION OF INSURANCE TO MORTGAGE DEBT. — The complainant mortgagee petitioned for foreclosure for default in payment of interest. Part of the property mortgaged had been destroyed by fire, and the defendant contended that the proceeds of an insurance policy thereon, procured by the mortgagor for the benefit of the mortgagee, should have been applied to the payment of the interest as it fell due. Had this been done, nothing would have been due when the petition was brought. *Held*, that the petition be dismissed. *Thorp* v. *Croto*, 65 Atl. Rep. 562 (Vt.).

It has been held that the mortgagor cannot insist on the mortgagee's applying the proceeds of an insurance policy, taken out by the mortgagor for the mortgagee's benefit, to a mortgage debt not yet due. *Naquin* v. *Texas, etc., Ass'n*, 67 S. W. Rep. 85 (Tex.). It has also been held that the mortgagee cannot insist on such application. *Fergus* v. *Wilmarth*, 117 Ill. 542. After payments are due, however, there is some uncertainty in the language of the courts as to the exact manner in which proceeds of insurance should be applied. On the one hand are statements that they should be applied to the debt *pro tanto*. See *Fowley* v. *Palmer*, 5 Gray (Mass.) 549. And it has been said that such a fund should be treated as are rents and profits of the estate. See *Larrabee* v. *Lambert*, 32 Me. 97. On the other hand are statements that the proceeds should be held as a substitute for the property destroyed. See *Powers* v. *Insurance Co.*, 69 Vt. 494; *Gordon* v. *Ware Sav. Bank*, 115 Mass. 588. This last view seems sound. Since insurance represents destroyed property, it would seem that either the mortgagor or mortgagee might insist on its being used to restore the destroyed property or kept intact as a substitute therefor, instead of being exhausted in the payment of interest or instalments of principal. *Cf.* *Boutelle* v. *Minneapolis City*, 59 Minn. 493.

MUNICIPAL CORPORATIONS — FRANCHISES AND LICENSES — ESTOPPEL OF CITY TO DENY VALIDITY OF ORDINANCE. — A city by ordinance granted a lighting company the right to lay pipes in the streets. After several miles had been laid a bill was brought in the city's right to enjoin the company from laying more pipes and from maintaining those already laid, on the ground that the ordinance was *ultra vires*. *Held*, that the city is estopped to deny the validity of the ordinance. *Darby* v. *Norwood*, 52 Oh. L. Bul. 253 (Oh., C. P. Hamilton Co., Dec., 1906). See NOTES, p. 564.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — RESTRICTIONS ON SALE OF WHOLE STOCK BY RETAIL DEALERS. — A statute provided that sales by retail dealers of their entire stock should be void against creditors, unless, seven days before sale, notice of the intended transaction and its terms should be recorded in the town clerk's office. *Held*, that the statute is constitutional. *Young* v. *Lemieux*, 65 Atl. Rep. 436 (Conn.).

Prima facie the statute infringes two constitutional provisions. Restrictions on contracting are a deprivation of liberty. Also, retailers as a class are denied equal protection of the laws. But the police power may be a justification. Protection of citizens from fraud is one of its proper objects. *Powell* v. *Pennsylvania*, 127 U. S. 678. And retailers often contract debts, sell out secretly, and disappear, leaving creditors remediless. Furthermore, a retail business offers especial opportunities to sell quickly and secretly. This statute allows creditors to secure themselves. It has not the burdensome requirement of sending inventories to each creditor, found in similar statutes held unconstitutional. *Wright* v. *Hart*, 182 N. Y. 330; *Miller* v. *Crawford*, 70 Oh. St. 207. But it presses the necessity of making preferably private agreements public far beyond those sustained statutes requiring only notice to creditors. *Squire* v. *Tellier*, 185 Mass. 18; *Neas* v. *Borches*, 109 Tenn. 398. Whether such a statute is a reasonable, and therefore a valid, exercise of the police power is for the business judgment. But it is strange that the earliest American statute of this sort was passed in 1896, if the measure is as essential as claimed to protect creditors of a class which has existed always.

POLICE POWER — REGULATION OF PROPERTY AND USE THEREOF — FLAG LAWS. — A Nebraska statute forbade the use of the American flag for advertising purposes. The defendant was indicted for so using it on a bottle of beer. He pleaded that the statute was unconstitutional under the Fourteenth Amendment. *Held*, that it is valid. *Halter* v. *Nebraska*, U. S. Sup. Ct., March 4, 1907.

This affirms the decision of the state court, criticized in 19 HARV. L. REV. 532.

POWERS — DEFECTIVE EXECUTION — TIME OF EXECUTION. — The plaintiff's husband was entitled by his father's will to certain real estate for life with remainders over, with power to appoint by way of jointure to any wife he might marry. Before the testator died, the plaintiff's husband, by a settlement made in consideration of his intended marriage with the plaintiff, covenanted to exercise this power in her favor. The marriage took place, and on the testator's death the plaintiff's husband came into possession of the real estate, but died without appointing. *Held*, that the covenant was a defective execution of the power, valid in equity, and that the plaintiff is entitled to her jointure. *Charlton* v. *Charlton*, [1906] 2 Ch. 523. See NOTES, p. 560.

POWERS — POWER OF SALE — VALIDITY OF MORTGAGES. — Land was conveyed in trust for A for life, remainder in trust for the plaintiffs, with power in A to convey the fee absolutely and to re-invest the proceeds on similar trusts. A executed a purchase-money mortgage to the settlor and subsequently a second mortgage to the assignees of the first. *Held*, that the plaintiffs are bound by the first mortgage but not by the second, and that therefore a foreclosure sale under the second alone transferred only an equitable life estate. *Stump* v *Warfield*, 65 Atl. Rep. 346 (Md.). See NOTES, p. 568.

PUBLIC OFFICERS — NATURE OF PUBLIC OFFICE — DE FACTO OFFICES. — At the time when a motion for a new trial was granted, the session of the court authorized by a valid law had come to an end. There was no authority for the court's activity except under a law subsequently declared unconstitutional. *Held*, that the grant of the motion for a new trial is void. *Norwood* v. *Louisville & Nashville Ry. Co.*, 42 So. Rep. 683 (Ala.).

The doctrine of *de facto* officers is well established. It is generally rested upon the policy of protecting innocent third parties dealing with the *de facto* officer. Upon the question whether or not there can be a *de facto* office, authority is much less abundant. The United States Supreme Court, representing the decided weight of authority, has denied the possibility. *Norton* v. *Shelby County*, 118 U. S. 425; *Flaucher* v. *Camden*, 56 N. J. L. 244. It has been strongly urged, on the other hand, that the policy underlying the doctrine of *de facto* officers would often require a doctrine of *de facto* offices, particularly where a statute not yet declared unconstitutional gives color of right. *Burt* v. *Winona & St. Peter R. R. Co.*, 31 Minn. 472; see *Donough* v. *Dewey*, 82 Mich. 309. When the acts of officials of a *de facto* municipal corporation are concerned, the problem may be treated as involving merely a question of *de facto* corporations. *Riley* v. *Garfield Township*, 58 Kan. 299. It has also been treated, however, as involving the status of a *de facto* officer in a *de facto* office. *State* v. *Gardner*, 54 Oh. St. 24. If the doctrine of *de facto* offices is ever to be invoked, the present case seems a proper one for its application, for there was here a statute not yet declared unconstitutional, and merely temporary non-existence of the office.

QUASI-CONTRACTS — MONEY PAID UNDER DURESS OR COMPULSION — VOLUNTARY OVERPAYMENT TO AVOID BUSINESS LOSS. — The plaintiff owed the defendant $880, but the latter, under a reasonable interpretation of the contract, claimed $1500. The plaintiff paid the latter amount under protest in order, by freeing his property from the defendant's lien, to secure an immediate loan, which would probably save him from bankruptcy. He then sued to recover the overpayment. *Held*, that he can recover. *Rowland* v. *Watson*, 88 Pac. Rep. 495 (Cal.).

In general, payments made freely and with full knowledge of the facts cannot be recovered. The conduct of a creditor in retaining an overpayment is clearly unconscionable, but there is strong public policy against permitting parties, who have once settled their dispute, afterward to ask a court to pass upon it. However, if money is paid because of duress of person, public policy favors a recovery. *Cadaval* v. *Collins*, 4 A. & E. 858. The same is true if the party receiving the money has any other power over his debtor. It is on this principle that recovery of money paid as usurious interest is allowed. *Bosanquett* v. *Dashwood*, Cas. t. Talb. 37. The language of many cases would indicate that the party paying cannot recover unless there is direct coercion by the one receiving the payment. See *Lehigh Co.* v. *Brown*, 100 Pa. St. 338. But it is the better view that any necessity which urges the debtor to make payment before his rights can be determined in a court of law, will take the case out of the rule of public policy. *Joannin* v. *Ogilvie*, 49 Minn. 564; *Astley* v. *Reynolds*, 2 Str. 915. The principal case illustrates the liberal tendency of the modern decisions. See *West Virginia Co.* v. *Sweetzer*, 25 W. Va. 434.

SURETYSHIP — DEFENSE OF ALTERATION OF CONTRACT — FAILURE OF PRINCIPAL TO SIGN BOND. — A bond, purporting to be the obligation of the treasurer of a school district as principal and of others as sureties, was executed by the sureties alone in ignorance that the principal had not signed. *Held*, that the sureties are not bound. *School District No. 80* v. *Lapping*, 110 N. W. Rep. 849 (Minn.).

In cases where a principal is otherwise bound to perform the act guaranteed, the liability of a surety in an obligation purporting to be also the obligation of the principal, but not signed by him, is a subject of considerable conflict. The weight of authority holds the surety liable on the ground that the surety is in no way affected by the already bound principal's failure to sign. *Trustees of Schools*

v. *Sheik*, 119 Ill. 579; *Cockrill* v. *Davie*, 14 Mont. 131. Other decisions hold the surety relieved because the instrument is incomplete on its face, and the surety's liability should not be extended beyond his literal undertaking. *Russell* v. *Annable*, 109 Mass. 72. A distinction is sometimes taken between joint obligations and joint and several obligations, the surety being held only on the latter. *Sacramento* v. *Dunlap*, 14 Cal. 421. Other decisions distinguish between ordinary sureties and those on the official bond of public officers, on the ground that a public officer is more directly liable independently of the surety-ship bond. *State* v. *Bowman*, 10 Oh. 445. It would seem that where the surety can show no injury by reason of the absence of the principal's signature, he should be held liable. *Cf. Bollman* v. *Pasewalk*, 22 Neb. 761.

TAXATION — PROPERTY SUBJECT TO TAXATION — EASEMENTS. — The plaintiff was the owner of a right of way over a strip of land. The land was assessed only against the owner of the fee, and on non-payment of taxes actual notice was given the latter and an advertisement of sale was published for the statutory period. The property was then sold for taxes. The plaintiff claimed that the property should not have been exclusively assessed against the owner of the fee. *Held*, that the sale is valid. *Hill* v. *Williams*, 65 Atl. Rep. 413 (Md.).

A valid tax sale will give the purchaser a title free from all incumbrances. *Textor* v. *Shipley*, 86 Md. 424. The plaintiff's easement was therefore completely extinguished unless the sale was void. If the land was assessed against an improper person, it clearly could not be sold for the non-payment of such tax. *Whitney* v. *Thomas*, 23 N. Y. 281. The question, therefore, is simply whether the owner of the fee should pay the entire tax or whether it should be partly borne by the owner of the easement. The policy of the law seems to be to assess real estate against the person having the paramount title. *Willard* v. *Blount*, 11 Ired. (N. C.) 624. This would dispose of the present case. Authority goes even further and holds that incorporeal hereditaments are not taxable real estate. *Boreel* v. *City of New York*, 2 Sandf. (N. Y.) 552. Thus a water company's right to flood land is held not taxable. *Fall River* v. *County Commissioners*, 125 Mass. 567. Similarly a right to enter and cut timber has been held exempt both on the ground of its not being real estate and because to tax it might subject the land to double taxation. *Iron Works* v. *Cone*, 56 Vt. 603.

USURY — NATURE AND VALIDITY OF USURIOUS CONTRACT — APPLICATION OF FEDERAL STATUTE TO STATE BANK BUYING INSTRUMENT ORIGINALLY USURIOUS. — § 5198 of the U. S. Compiled Statutes 1901 provides that, though a national bank knowingly charges a usurious rate, the instrument shall not be void. N. Y. Laws 1837, c. 430, § 1, provided that all instruments charging a usurious rate should be void; but N. Y. Laws 1892, c. 689, § 55, provided that state banks should be subject to the same usury laws as national banks. A note was made by the defendant, at a usurious rate, to a payee not a bank. It was later bought at a legal rate and sued on by a state bank which knew of the usury. *Held*, that there can be recovery. *Schlesinger* v. *Lehmaier*, 102 N. Y. Supp. 630 (App. Div.).

The decision is based partly on the incongruity which would result if a bank could sue on a usurious instrument made to it as payee, which the statute allows, and yet not on one, of usurious inception between private parties, bought by it without usury. But this does not answer the objection that, by the general usury law of the state, no obligation existed for the bank to buy, the note being void from the start; whereas, if the bank is payee, the special statute creates an obligation. It is a sounder ground that a national bank can in no way be bound by the state usury laws, because such laws interfere with the operation of a governmental agency. *Farmer's, etc., Nat'l Bank* v. *Dearing*, 91 U. S. 29. To purchase negotiable paper, as well as to discount it, seems appropriate to a national bank's operation. *Smith* v. *Exchange Bank*, 26 Oh. St. 141; *contra*, *Lazear* v. *Nat'l Union Bank*, 52 Md. 78. Nor should notice of the usury prejudice, for under the combined statutes notice does not avoid the instrument if the bank is payee, where notice is certainly a graver objection than here. See *Schlesinger* v. *Kelly*, 99 N. Y. Supp. 1083.